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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 76-653

ALLIED-GENERAL NUCLEAR SERVICES, et al., *Petitioners*,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

No. 76-762

COMMONWEALTH EDISON COMPANY, et al., *Petitioners*,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

No. 76-769

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner*,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

No. 76-774

BALTIMORE GAS AND ELECTRIC COMPANY, et al., *Petitioners*,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

**On Writs of Certiorari to the United States Court of Appeals
For the Second Circuit**

**RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL,
INC., ET AL. RESPONSE TO THE SUGGESTIONS OF MOOTNESS**

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The Nuclear Regulatory Commission and all of the petitioners assert that this proceeding is now moot. We agree. If this Court should decide that it is necessary to vacate the judgment of the Court of Appeals and/or direct dismissal of the petition for review, it should make clear that the action is being taken because the NRC has mooted the case by choosing to withdraw the November 11, 1975, Order, which is the subject of this litigation, and replacing it with the December 23, 1977, Order.²

Although this new Order or its implementation may become the subject of future litigation,³ that does not

¹ Due to time constraints, respondent New York State was unable to file a response prior to anticipated Court review of the mootness issue. It has authorized us to state that the views expressed here are in accordance with its views.

² This process of an appellant taking voluntary action which essentially brings it into compliance with the lower court's mandate has been traditionally viewed as a principal basis for finding an appeal moot. See, e.g., *American Book Co. v. Kansas ex rel Nichols*, 193 U.S. 49, 51-52 (1904).

³ Whatever else may be said with respect to the validity of the December 23 Order, that portion of the Order which withdraws the November 11, 1975, Order—an Order which was defended by NRC and petitioners as permissible discretion and an Order which attempts to create an exception to full compliance with NEPA—is an action which is fully within the discretion of the NRC and thus immune from court reversal. On the other hand, aspects of the December 23 Order, particularly as described in the Suggestion of Mootness, which are not directly involved in this litigation, may give rise to future litigation but of course that possibility, related to issues not involved here, is irrelevant to the issues of mootness. The action which mooted this case was withdrawal of the Order which was the subject of the litigation.

justify waiting one to two years or longer to see how that litigation is resolved before this Court decides whether this case is moot. Given the fact that "... nuclear reactors are fast-developing and fast changing" and "[w]hat is up to date now may not, probably will not, be as acceptable tomorrow" (*Power Reactor Develop. Co. v. Electrical Union*, 367 U.S. 396, 408 (1961)), it is reasonably certain that whatever future controversies may arise over plutonium recycle-related activities, they are most unlikely to be repetitive of the present case and in any event would be capable of review. Compare *Southern P. Terminal Co. v. Interstate Comm. Com.*, 219 U.S. 498 (1911).

Respectfully submitted,

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